

MAJLIS PEGUAM

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v.

JEYAPALAN MAHESAN

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH

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[ORIGINATING SUMMONS NO: R1-17-62-99]
22 FEBRUARY 2000

LEGAL PROFESSION: *Practice and etiquette - Guilty advocate and solicitor - Legal Profession Act 1976, s. 88 - Application by Bar Council for order of court to compel defendant to produce documents - Legal Profession Act 1976, para 2(b) of schedule - Whether notice sent earlier to defendant to comply with requirement for the production of documents accurate - Whether application dismissed*

c

LEGAL PROFESSION: *Practice and etiquette - Guilty advocate and solicitor - Legal Profession Act 1976, s. 88 - Suspension order by Chief Justice - Bar Council certified that defendant was dishonest in practice only one year thereafter - Whether failure of Bar Council to act promptly rendered action under s. 88 invalid*

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By an order of the Chief Judge of Malaya, the defendant, an advocate and solicitor, was suspended from practice under s. 88A(3) of the Legal Profession Act 1976 ('the Act'). About a year after the said order, the plaintiff, the Malaysian Bar Council, certified pursuant to s. 88(1) of the Act that there was reasonable cause to believe that the defendant, Mr Jeyapalan Mahesan of the firm Messrs Clough Thuraisingham & Jeya Mahesan was found guilty of dishonesty in practice. The Bar Council then resolved that the powers under s. 88 of the Act and the Schedule thereto be exercised in relation to his firm by the appointment of one Mr Puravalen as its representative. Mr Puravalen issued a notice pursuant to para. 1 of the Schedule to the defendant requiring that certain documents be handed to him. The defendant replied to that notice refusing to deliver the documents requested for. Hence the instant application to the High Court under para 2(b) of the Schedule to the Act.

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The defendant objected to the application on the basis that: (i) the Bar Council had sat on the suspension order of the Chief Judge Malaya for about 12 months before deciding to move against the defendant under s. 88(1) of the Act and the Schedule thereto; and (ii) that there was inaccuracy in what

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- a* the Bar Council was seeking for as in its certificate issued under s. 88(1) of the Act, it had referred to the defendant of the firm of Messrs Clough Thuraisingham & Jeya Mahesan whereas the notice sent to the defendant referred to the defendant of the firm of Messrs Mahesan & Co.

Held:

- b*
- [1] The Bar Council should have acted promptly but it did not, waiting almost a year before certifying that the defendant had been guilty of dishonesty in connection with practice. However, that did not invalidate the action under s. 88(1) of the Act which set the provisions of the Schedule thereto in motion.
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- [2] The notice sent by Mr Puravalen who acted for the Bar Council went outside the scope of duty entrusted in him which was to go against the defendant and the firm of Clough Thuraisingham & Jeya Mahesan. No proof was afforded that the firm was Messrs Mahesan & Co and that it existed at the time of the suspension. Paragraph 2(b) allows the court to make the order under its terms but the court must first be satisfied that the requirement stated in para. 1 of the Schedule is complied with. The requirement in the form of the notice did not comply with what the Bar Council resolved nor was it shown that Messrs Jeya Mahesan existed at the time of the suspension. Thus, the order requested for could not be made.
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- e*

Per curiam

- f* [1] If a charge for a criminal offence was brought under para. 2(a) of the Schedule for non-compliance of the requirement, it is most unlikely that the charge would succeed in this case as the ingredients of the offence could not be proved on the facts disclosed.

[Application dismissed.]

- g* **Legislation referred to:**
Legal Profession Act 1976, ss. 88(1), (2), (3), (6), 88A(3)

For the plaintiff - N Navaratnam; M/s Saheran Woon N Navaratnam

For the defendant - Manjeet Singh Dhillon; M/s Manjeet Singh Dhillon & Co

- h* *Reported by Usha Thiagarajah*

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JUDGMENT

KC Vohrah J:

Under para. 1 of the schedule to the Legal Profession Act 1976 (the Act) the Bar Council may require the production or delivery to an appointed person and the Bar Council may take possession of certain documents in the possession and control of an advocate and solicitor or his firm.

The schedule also provides other procedures to be adopted after the Bar Council has taken possession of such documents as to notices of the particulars of the said documents to be sent to the said advocate and solicitor, for the said advocate and solicitor to apply to a judge in chambers for the return of the documents and for the Bar Council to deal with the documents. There are other procedures relating to trust moneys relative to the said advocate and solicitor or his firm.

Under para. 2(b) of the schedule, the High Court or a judge may, on the application of the Bar Council, *inter alia*, order that person to comply with the requirement made under para. 1 and to deliver documents within such time as may be specified in the order or to search for and take possession of the documents referred to in para. 1.

The application before me is an application against the defendant made pursuant to the said para. 2(b). The Bar Council relies on s. 88 as the basis for the application under the said para. 2(b).

Sub-s. (1) of s. 88 reads:

88.(1) The Bar Council may if it has reasonable cause to believe that an advocate and solicitor, or a clerk or servant of an advocate and solicitor, has been guilty of dishonesty in connection with that advocate and solicitor's practice as an advocate and solicitor or in connection with any trust of which that advocate and solicitor is a trustee, issue a certificate to that effect and thereupon the Schedule, except paragraph 7 thereof shall apply in relation to that advocate and solicitor.

Since the defendant has referred to several subsections of the same section, the relevant subsections of s. 88 are reproduced below:

88(1) ...

(2) Where the name of an advocate and solicitor is removed from the Roll or an advocate and solicitor is suspended from practice, he shall, within twenty one days from the material date, satisfy the Bar Council

- a** that he has made suitable arrangements for making available to his client or to some other advocate and solicitor or advocates and solicitors instructed by his client or by himself –
- b** (a) all deeds, wills, documents constituting or evidencing title to any property, papers, books of account, records, vouchers and other documents in his or his firm's possession or control, or relating to any trust of which he is the sole trustee or co-trustee with one or more of his partners, clerks or servants; and
- (b) all sums of money due from him or his firm to, or held by him or his firm on behalf of his clients or subject to any such trust as aforesaid.
- c** (3) If he fails so to satisfy the Bar Council the said Schedule shall apply in relation to him.
- (4) ...
- d** (5) ...

e The relevance of sub-ss. (2) and (3) of s. 88 can be seen in the context of an order made against the defendant in 1998. On 16 July 1998 the Chief Judge Malaya, by an order, suspended the defendant from practice under s. 88A(3) of the Act. Under sub-s. (6) of s. 88A, the provisions of sub-ss. (2) and (3) of s. 88 shall apply *mutatis mutandis* to the advocate and solicitor relative to the date of the order of suspension of the Chief Judge.

f Coming back to the application before me, it seeks an order that the defendant hand over within seven days of the order to Mr. Puravelan certain documents in his possession or in the possession of Messrs Jeya Mahesan in connection with, *inter alia*, cases or conveyancing files handled, or books of accounts and other documents relating to clients and office accounts maintained, by Messrs Jeya Mahesan & Co. The relevant terms of the order sought for read as follows:

- g** 1. The Defendant either by himself, or his servant, or his agent or employees, do cause to be delivered to Mr. M. Puravalen within 7 days of the date of the order herein being served on the Defendant, all deeds, wills, documents constituting or evidencing title to any property, papers, books of account, records vouchers and other documents in the Defendant's or
- h** his firm's possession or control, or relating to any trust of which he is the sole trustee or co-trustee with one or more of his partners, clerks or servants, and all sums of money due from him or his firm to, or held by him or his firm on behalf of, his clients or subject to any such trust as aforesaid including but not limited to the following:

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- (i) all files related to any cases conducted by Messrs Jeya Mahesan & Co inclusive of but not limited to files which have been closed (inactive) or which are still open (active); and **a**
 - (ii) all conveyancing files conducted by Messrs Jeya Mahesan & Co inclusive of but not limited to the files which have been closed (inactive) or which are still open (active); **b**
 - (iii) all books of account, records, vouchers, cash books, books of receipt, bank statements, relating to client's accounts and office accounts maintained by Messrs Jeya Mahesan & Co inclusive of but not limited to other books, records and/or documents related to or containing any financial information in regards to the practice of the Defendant at Messrs Jeya Mahesan & Co; **c**
 - (iv) all deeds wills and documents constituting or evidencing title to any property.
- 2 ... **d**
- 3 ...

It will be observed that the purported firm of the defendant in the order sought for is named as "Messrs Jeya Mahesan & Co".

It is pertinent to sketch out the nature of the course of action the Bar Council took before making its application to the court. **e**

About 1 year after the Chief Judge Malaya had made the suspension order against the defendant under s 88A(3), the Bar Council on 12 June 1999 certified pursuant to s. 88(1) that there was reasonable cause to believe that the defendant "Mr. Jeyapalan Mahesan of Messrs Clough Thuraisingham & Jeya Mahesan" (amongst other persons) had been found guilty of dishonesty in connection with his practice and resolved that the powers under s. 88 and the Schedule to the Act be exercised in relation to his firm by the appointment of Mr. Puravalen as its representative to exercise all or any of the powers under the relevant provisions of the Act on its behalf. **f**

The Bar Council on the same date resolved, *inter alia*, that Mr. Puravalen be appointed under s. 88 of the Act to take control of the files and clients' accounts of Mr. Jeya Mahesan and to exercise the powers provided under the schedule in relation to the said matters. **g**

Following his appointment, Mr. Puravalen issued a notice on 29 July 1999 pursuant to para. 1 of the Schedule to the defendant requiring that certain documents to be handed over to him. The relevant part of the notice reads (and it will be noted that the name of the firm referred to in the notice is Messrs Jeya Mahesan & Co): **h**

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- a* RE: NOTICE UNDER THE SCHEDULE PURSUANT TO SECTION 88(1) OF THE LEGAL PROFESSION ACT 1976
1. TAKE NOTICE that I, M. PURAVALEN have been appointed by the BAR COUNCIL OF MALAYSIA on the 12th June 1999 in accordance with Section 88(3) of the Legal Profession Act 1976 to take control of
- b* the files and clients' accounts of your firm, Messrs JEYA MAHESAN & CO.
2. TAKE FURTHER NOTICE that CERTIFICATE dated 12th of June 1999 has been issued by the BAR COUNCIL pursuant to SECTION 88(1) certifying that there is reasonable cause to believe that you MR. JEYA
- c* MAHESAN have been guilty of dishonesty in connection with your practice.
3. I, M. PURAVALEN pursuant to Paragraph 1 of the said Schedule hereby exercise my powers and require you MR. JEYA MAHESAN to deliver to me on the 4th of AUGUST 1999 at 10.00 am at the BAR COUNCIL
- d* at No. 5, Jalan Tun Perak, 50050 Kuala Lumpur the following:
- (a) All files pertaining to cases handled by your firm whether closed or active;
- (b) All conveyancing files handled by your firm whether closed or active;
- e* (c) All books of accounts: Records; Vouchers; Cash Books: Receipt Books; Bank Statements; Fixed Report Receipts; Clients' Accounts; Office Accounts; and any other books, records and or documents pertaining to financial information with respect to your practice.
- (d) All deeds, wills, documents constituting or evidencing the title to any
- f* property.
4. TAKE FURTHER NOTICE that your failure to surrender the above will expose you to sanctions under paragraph 2(a) of the Schedule.
5. Please note that you can exercise your rights pursuant to Paragraph 5 of
- g* the Schedule.
- The defendant, on 4 August 1999, replied to this notice and refused to deliver the documents requested for and thus this application before the High Court under para. 2(b) of the Schedule to the Act.
- h* The defendant has objected to the application. An observation was made that the Bar Council had sat on the suspension order of the Chief Judge Malaya for about 12 months before deciding to move against the defendant under s. 88(1) and the Schedule. But the thrust of the main objection to the application is this – the resolution made by the Bar Council relates to the
- i* exercise of powers under the Schedule in respect of the defendant who was

named in the certificate of the Bar Council of 12 June 1999 as being Mr. Jeva Mahesan of the firm of “Messrs Clough Thuraisingham & Jeya Mahesan” but the notice sent relates to the delivery of “files and accounts of your firm Messrs Jeya Mahesan & Co” and the notice went beyond what was resolved by the Bar Council. Then it is argued, but basically it is the same argument as the main one, that there is inaccuracy in what the Bar Council is seeking for and the defendant has difficulty in responding to the notice.

Although the provisions of the Schedule to the Legal Profession Act 1976 could have been applied to the defendant after he had been suspended on 16 July 1998 by the Chief Judge Malaya provided certain conditions were fulfilled by virtue of sub-s. (6) of s. 88A and sub-ss. (2) and (3) of s. 88, I see no bar in the Bar Council having taken action under s. 88(1) which brought into operation the provisions of the Schedule. That the Bar Council did not take action by virtue of sub-s. (6) of s. 88A and sub-ss. (2) and (3) of s. 88 does not vitiate any action taken under s. 88(1). The Bar Council under s. 88(1) acted on the “dishonesty” of the advocate and solicitor and it is in evidence that the defendant was suspended from practice. It must be observed that whatever the course of action the Bar Council takes, whether by virtue of s. 88(1) or by s. 88A(6) and sub-ss. (2) and (3) of s. 88, there is convergence in the use of the provisions of the Schedule (save for para. 7 which is excluded s. 88(1)) to proceed with certain procedures relating to certain documents and moneys in the possession of an errant advocate and solicitor and his firm where the advocate and solicitor has resisted compliance with applicable rules.

The Bar Council should ideally have acted more promptly but that it did not, waiting for almost a year before certifying on 12 June 1999 that the defendant, Mr. Jeyapalan Mahesan of Messrs Clough Thuraisingham & Jeya Mahesan”, had been guilty of dishonesty in connection with his practice, does not invalidate the action under s. 88(1) which set the provisions of the Schedule into motion. Action under the Schedule is certainly a necessity to protect the interests of former clients in respect of their documents and moneys in the control or possession of the defendant or his firm and it is really a case of better late than never if the notice in respect of what is required under para. 1 of the Schedule which was sent is valid.

In regard to the notice sent by Mr. Puravalen. appointed by the Bar Council, “to take control of files and clients’ accounts of your firm, Messrs Jeya Mahesan & Co”, the argument is that it has to be shown that at the material time – the date of the suspension order – that there was a practice known as “Messrs Jeya Mahesan & Co.” It is pointed out that the resolution of the Bar Council of 12 June 1999 referred to the defendant as being of the firm of

- a* “Messrs Clough Thuraisingham & Jeya Mahesen.” The notice, it is argued, is directed at the firm of Messrs Jeya Mahesan which did not exist at the material time, 16 July 1998.

- b* It will be noted that the notice does not request for the files and clients’ accounts in the possession of the defendant but “the files and clients’ accounts of your firm Messrs Jeya Mahesan & Co.” The Bar Council certified on 12 June 1999 that action was to be taken against the defendant, “Mr. Jeyapalen Mahesan of Messrs Clough Thuraisingham & Jeva Mahesan” and the notice sent by him in fact make reference to the certificate. Clearly the notice sent by Mr. Puravalen who acted for the Bar Council went outside the scope of
- c* the duty entrusted in him which was to go against the defendant and the firm of “Clough Thuraisingham & Jeya Mahesan”. In any event no proof was afforded that the firm was Messrs Mahesan & Co and that it existed at the time of the suspension. Paragraph 2(b) allows the court to make the order under its terms but the court must first be satisfied that if “any person having
- d* possession or control of any such documents fails to comply further with such requirement”, the requirement being what is stated in para. 1 (and in the context of the Bar Council’s resolution, the notice, sent by Mr. Puravalen). The requirement (in the form of the notice) does not comply with what the Bar Council resolved nor has it been shown that Messrs Jeya Mahesan existed
- e* at the time of the suspension. I cannot make the order requested for.

- As a passing thought, if a charge for a criminal offence is brought under para. 2(a) of the Schedule for non compliance of the requirement it is most unlikely the charge will succeed as the ingredients of the offence cannot be proved on the facts disclosed before me in this case.

- f* I would dismiss the application with costs.

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